REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

15-3844

WILLIAM EVANS

Appellant

v.

ROBERT A. MCDONALD
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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APPELLANT'S REPLY ARGUMENTS

I. The Board did not appropriately weigh the evidence, but rather, incorrectly concluded that the lay statements were *contradicted* by other evidence of record, and used that unsupported finding as a basis for disregarding such statements.

The Secretary claims that the record contains evidence that indicates the Veteran did not serve in Vietnam and was not exposed to herbicides during his Thailand service. Sec. Br. at 13. However, he then proceeds to only cite a *lack* of evidence. *Id.* (personnel records do not reference service in Vietnam and do not show activities related to exposure in Thailand); *see Buczynski v. Shinseki*, 24 Vet.App. 221 (2011) (Board may not consider the absence of evidence as substantive negative evidence).

The Secretary does not cite any affirmative evidence indicating that the Veteran was not exposed to herbicides. *See* Sec. Br. at 13-17. He suggests that the Veteran's service records showing that he was stationed at U-Tapao in Thailand is positive evidence that he was never in Vietnam, and was not exposed to herbicides in Thailand. Sec. Br. at 14. But simply the fact that Mr. Evans was stationed at U-Tapao does not rule out the possibility that he set foot in Vietnam, or was exposed while in Thailand. Indeed, the Veteran has claimed that he flew to Vietnam from Thailand multiple times. Apa. Open. Br. at 6; R-478; R-502.

Additionally, if the Veteran was near the perimeter of the air base, he may have been exposed to herbicides in Thailand. Apa. Open. Br. at 8; M21-1.IV.ii.1.H.5. The

Secretary also cites the fact that the Veteran was an administrative specialist, which is not one of the occupations automatically associated with service near the perimeter of the base. Sec. Br. at 14. But again, this does not rule out the possibility that the Veteran nevertheless served near the perimeter. Herbicide exposure can be established on a "facts found" basis if the Veteran was "*otherwise near the air base perimeter* as shown by evidence of daily work duties, performance evaluation reports, *or other credible evidence*." M21.IV.ii.1.H.5.b.

The Secretary cites the lack of service evidence showing contact with the base perimeter or service in Vietnam to support his argument that the Board's decision was adequate. Sec. Br. at 14-17. Specifically, the Secretary contends that it was reasonable for the Board to conclude that the lack of evidence suggesting exposure was more probative than the Veteran's lay statements asserting exposure. Sec. Br. at 17. This would be a defensible position, had the Board actually weighed the evidence and determined that the lack of service record evidence of exposure was more probative.

As the Secretary states, the Board is allowed to "weigh the absence of contemporaneous medical evidence against the lay evidence of record." Sec. Br. at 16 (citing *Buchanan v. Nicholson*, 451 F.3d 1313, 1337 (Fed. Cir. 2006)). The problem is that this is not what the Board did. Rather than weighing the evidence and providing reasons or bases for concluding that the lay statements were less probative, the Board *wrongly* determined that the lay statements were actually *contradicted* by the other evidence of record, and used that finding to justify its decision to find that the lay

statements had absolutely no probative value. Apa. Open. Br. at 6-7. *Nothing* in the record contradicts the Veteran's lay statements. Rather, the service records simply do not *corroborate* such statements. R-478; R-502. But the Board cannot disregard the lay statements simply because they are not corroborated by contemporaneous evidence. *Dalton v. Nicholson*, 21 Vet.App. 23, 40 (2007); *Buchanan*, 451 F.3d at 1337.

The Veteran does not dispute that the Board is allowed to weigh the evidence, but here, its decision to disregard the lay statements was based on a misreading of the evidence, and the *inaccurate* conclusion that the lay statements were contradicted. For this reason, remand is warranted for the Board to adequately assess the evidence of record, and to provide adequate reasons or bases for its decision to weigh certain evidence more heavily. *See McClain v. Nicholson*, 21 Vet.App. 319, 325 (2007).

II. The Board misinterpreted 38 U.S.C. § 5103A and 38 C.F.R. § 3.159 (2016) when it failed to develop evidence related to the Veteran's potential exposure to herbicides in Thailand.

The Secretary argues that VA undertook the appropriate development with regard to whether the Veteran was exposed to herbicides while serving in Thailand. Sec. Br. at 10. In this regard, he cites two notice letters which the RO sent to the Veteran in March 2009 and March 2011, alerting him of the opportunity to submit evidence of herbicide exposure. Sec. Br. at 10 (citing R-480-81 and R-513-22). The Secretary claims that these letters satisfied the requirement that VA "[a]sk the Veteran for the approximate dates, location, and nature of the alleged exposure." M21-1, Part IV, Subpart ii, Chapter 1, Section H.5.b. However, the Secretary is incorrect.

The March 2011 *Nehmer* letter only told the Veteran that he had the opportunity "to submit evidence showing service in the Republic of Vietnam, or its inland waterways." R-480. This was not a request for the approximate dates, location, and nature of *any* exposure, but rather, asked the narrower question of whether the Veteran was in Vietnam. *Id.* Therefore, the March 2011 *Nehmer* letter did not satisfy the duty to assist requirement, as the Secretary alleges. Sec. Br. at 11; Apa. Open. Br. at 10.

The March 2009 notice letter told the Veteran that he could have been exposed to herbicides due to "his job in service (other than in Vietnam)" and advised him to explain when, where, and how you were exposed." R-515. But at the time VA sent this letter, Mr. Evans had not yet been told that exposure was possible based on proximity to the perimeter of the base on which he was stationed. And the March 2009 notice letter did not explain this possibility. R-513-22. VA must notify the claimant of the evidence necessary to substantiate the claim. 38 C.F.R. § 3.159(b)(1). The Veteran cannot explain when, where, and how he was exposed to herbicides if he is not even aware of the possible circumstances of exposure.

The Veteran's "job in service" is not the only indicator of whether he may have been exposed to herbicides by virtue of being near the perimeter of the base, but the notice letter did not explain this. R-515. If the Veteran served "near the air base perimeter as shown by . . . credible evidence," herbicide exposure should be conceded. M21-1.IV.ii.1.H.5.b. Although the Veteran's job duties in service are one

way to establish proximity to the perimeter, it is not the only method of showing this. *See id.* Yet the March 2009 notice letter misled the Veteran to think that he had to show a job in service that exposed him to herbicides. R-515. Therefore, the Veteran may not have even known that he could establish exposure, despite the fact that he worked in an administrative department. Remand is required for the Board to provide proper notice to the Veteran regarding the evidence that he would need to submit to show exposure. 38 C.F.R. § 3.159(b)(1). The March 2009 notice letter was incomplete in this regard.

The Secretary also supported his argument that VA appropriately developed evidence pursuant to the Veteran's claim because the RO obtained a memorandum regarding herbicide use in Thailand. Sec. Br. at 10; R-541-53. This memorandum discussed the use of commercial herbicides within fenced perimeters, and indicated that a veteran had a greater likelihood of exposure to such herbicides if his MOS or unit regularly had contact with the base perimeter. R-542. As such, it did not inform the Veteran that he could submit *other* evidence regarding proximity to the perimeter, but simply reiterated the idea in the March 2009 notice letter that the Veteran's job during service may be relevant. *Id.*

The memorandum specifically states that "unless the claim is inherently incredible, clearly lacks merit, or there is no reasonable possibility that further VA assistance would substantiate the claim, . . . regional offices should send a request to JSRRC for any information that this organization can provide to corroborate the

veteran's claimed exposure. R-542. Despite this instruction, VA failed to request a search for records regarding possible exposure in Thailand due to proximity to the perimeter of the base.

The Secretary disputes this argument, suggesting that VA did obtain a finding from JSRRC "that all efforts to corroborate Appellant's claim of herbicide exposure had been exhausted." Sec. Br. at 10-11; R-539. The Secretary overlooks the fact that the subject of this memorandum was titled: "Formal finding on the veteran's presence in Vietnam for Agent Orange exposure." R-539. But establishing a presence in Vietnam is only one way to show herbicide exposure; it is not the only way. It appears from this subject title that the formal finding only relates to exposure due to service in Vietnam. *Id.* Therefore, remand is required for VA to specifically request information from JSRRC on whether there is evidence that suggests the Veteran was exposed to herbicides by virtue of his proximity to the perimeter on the air force base in Thailand. Apa. Open. Br. at 10-11.

III. The Secretary's explanation for why the third *McLendon* step is not met is post-hoc analysis, and should be rejected.

The Secretary concedes that the Board erred when it ignored in-service evidence of a skin disorder on the left foot. Sec. Br. at 19; R-808. However, he argues that such error is harmless because the third step of *McLendon* was not met, in that there is no indication that the Veteran's current foot disability may be associated

with his documented cellulitis in service. Sec. Br. at 19; *see McLendon v. Nicholson*, 20 Vet.App. 79, 83 (2006).

The Veteran suggested that the evidence of a skin disorder of the left foot during service combined with evidence of similar skin disorders of both feet after service may be sufficient to meet the low threshold of step three in *McLendon*. 20 Vet.App. at 83; Apa. Open. Br. at 13; R-808; R-1091; R-1110; R-1122. The Secretary responds that there is no evidence suggesting these skin disorders are similar. Sec. Br. at 19. But it is the *Board's* job to assess the evidence, and determine whether the in-service cellulitis may be similar to the more recent skin disorders of the feet, and whether any such similarity indicates that there may be an association sufficient to meet the low threshold of step three in *McLendon*. 20 Vet.App. at 83; *see Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 146 (1991) (holding that litigating positions are not entitled to judicial deference when they are merely counsel's "post-hoc rationalizations" for agency action and are advanced for the first time on appeal); *Wanless v. Principi*, 18 Vet.App. 337, 343 (2004) (Steinberg J., concurring) (stating that the "Court's role is to review whether the Board in its decision, rather than the Secretary in his brief, provided an adequate statement of reasons or bases").

The Secretary's attempt to explain why such evidence does not meet the third step in *McLendon* is merely post-hoc analysis that the Board should have engaged in in the first instance. But the Board did not even reach the question of whether the third

step of *McLendon* was satisfied, because it incorrectly found that there was no in-service event, disease, or injury. R-6. Remand is required for the Board to consider the in-service evidence of cellulitis in the first instance, and discuss whether an examination is needed under *McLendon*. 20 Vet.App. at 81.

CONCLUSION

The Board provided inadequate reasons or bases for finding that the evidence of record contradicted the Veteran's statements that he served in Vietnam. Although the evidence did not *corroborate* the Veteran's statements, it did not contradict them. The Board also failed to develop evidence relating to whether the Veteran served near the perimeter of the U-Tapao Air Base in Thailand. Finally, the Board failed to consider an in-service diagnosis of foot cellulitis when it determined that the Veteran's current foot skin disorder was not related to any in-service disease or injury. Remand is required for the Board to readjudicate the Veteran's claim under a correct interpretation of the law, provide adequate reasons or bases for its decision, and ensure that VA complies with its duty to assist the Veteran.

Respectfully submitted,

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